(1)

93-124

Supreme Court, U.S.
FILED
JUL 19 1993
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1993

PETER MICK AND DONALD BECK PETITIONER

VERSUS

RESOLUTION TRUST CORPORATION RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES THIRD CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

PETER R. MICK
PRO SE
4 STONEY BROOK TRAIL
KINNELON, NJ 07405
201-838-1725

DONALD C. BECK
PRO SE
18 WOOD GLEN WAY
PARSIPPANY, NJ 07005
201-334-7524

QUESTION

The Resolution Trust Corporation, a congressionally chartered agency, is bound by agreements that are written on the face of a mortgage[1]. Can it use an unwritten power to not honor these agreements while forcing the Appellants to honor their obligations? The agreements which the RTC is not honoring induced the Appellants to make the purchase money mortgage. Can the Federal Courts allow the RTC to use this unwritten power?

The RTC did use, and the 3rd Circuit Court of Appeals did allow the RTC to use, an unwritten power and therefore has the RTC with the support of the Federal Courts violated the Constitutional rights and rights given by law and doctrine of the

Note[1] Fannie Mae, a Congressionally chartered organization published these forms and millions have been executed.

Appellants by:

a) allowing the Federal Government to interfere with intra state commerce in a way denied even to the States per Article 1 Section 10 of the Constitution. "No State shall pass any law that impairs the obligation of contracts."?

b) depriving them of property, the agreements removed from the mortgage, protected by the 5th amendment?

c) depriving them of the liberty, to contract without government interference as allowed by the 5th amendment.

d) modifying 12 USC 1823(e) to allow the courts a choice to either test agreements to 12 USC 1823 (e) or to remove them because 1823 (e) would find them valid, and legally binding against the RTC?

e) deciding contrary to the principals of the following cases of the Supreme Court and the 7th Circuit?

- D'Denche, Duhme & Co. Inc. v. FDIC, 315 U.S.447, 62 S.Ct. 676, 86 L.Ed. 956 (1942).
- Langley v. FDIC, 484 U.S.86,108 S.Ct.396,400, 98 L.Ed.2d 340 (1987)
- Howell v. Continental Credit Corp., 655 F2d 743 (7th Cir. 1981)

TABLE OF CONTENTS

Questions Presented for Review.....i

Table of Authorities.....v

Opinions Below.....1

Jurisdiction.....2

Constitutional Provisions and Statutes Involved.....2

Statement of the Case.....5

Basis for Federal Jurisdiction in Court of First Instance.....10

Argument.....11

Conclusion.....21

Appendices

Opinion of 3rd Circuit Court of Appeals April 20, 1993.....A1

Opinion of the District Court of New Jersey September 1, 1992.....B1

Final Judgement October 14, 1992.....C1

Final Judgement September 23, 1992.....D1

Final Judgement October 21, 1992.....E1

TABLE OF AUTHORITIES

CASES CITED

D'Denche, Duhme & Co., Inc. v. FDIC, 315 U.S.447, 62 S.Ct. 676, 86 L.Ed. 956 (1942).....iii,14

Langley v. Federal Deposit Ins. Corp., 484 U.S.86, 108 S.Ct. 396, 400, 98 L. Ed.2d 340 (1987).....iii,15

Howell v. Continental Credit Corp. 655 F2d 743 (7th Cir. 1981).....iii,15

FEDERAL STATUES CITED

12 USC 1823 (e).....ii,3,10,14,15

12 USC a(b)(1)(A).....10

12 USC a(1) (1).....10

28 USC 1331.....10

UNITED STATES CONSTITUTION CITED

Article 1, Section 10.....ii,2,14,15

Fifth Amendment.....ii,3,14,15

IN THE SUPREME COURT OF THE UNITED STATES

1993

Peter Mick and Donald Beck — PETITIONER

V.

Resolution Trust Corporation — RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE 3RD CIRCUIT COURT OF APPEALS

The Petitioners Peter Mick and Donald Beck respectfully pray that a writ of certiorari issue to review the judgement of the United States 3rd Circuit Court of Appeals, entered on April 20, 1993.

OPINIONS BELOW

On April 20, 1993 the 3rd Circuit

Court of Appeals affirmed the judgement of the United States District Court in the district of New Jersey. The District Court issued their letter opinion and order on September 1, 1992.

JURISDICTION

The Judgement Order of the 3rd Circuit Court of Appeals was issued on April 20, 1993. This Court has jurisdiction per 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUES INVOLVED

The Constitution of the United States of America, Article 1, Section 10-1:

No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of

debts: pass any bill of attainder, ex post facto law or law impairing the obligation or contracts, or grant any title of nobility.

The Constitution of the United states of America, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Statute 12 U.S.C. 1823(e)

No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 or this title, either as security for a loan or by purchase or as receiver of any insured depositor institution, shall be valid against the corporation unless such agreement-

(1) is in writing,

(2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obliger, contemporaneously with the acquisition of the asset by the depository institution,

(3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board of committee, and

(4) has been, continuously from the time of its execution, an official record of the depository institution.

STATEMENT OF THE CASE

US Capital Corporation, the developer of the Enclave a 27 floor building on the boardwalk in Atlantic City that was being operated as a hotel, sold two hotel units to the Appellants and provided mortgage financing for same. In April of 1986, prior to purchase, the Appellants were given tours of the already operating Hotel and presented with Brochures, a public offering statement, a master deed, a Daily Room Rate Schedule and other information.

The Closing took place on June 25, 1986. The mortgage, composed of FNMA/FHLMC forms, which was prepared by US Capital Corporation was a bilateral obligation which contained agreements

representing that there were no restrictions on the right of a unit owner to rent or lease his unit. Therefore the units could be rented on a daily basis as in the already operating hotel program. Another agreement contained in the mortgage stated that the Lender or his successors and assigns must advise the Appellants that the Appellants have the right to assert any defense to acceleration and foreclosure. Also US Capital leased back the units for three years and they indicated that this would allow the hotel operation to mature, therefore reducing the risk to the appellants. In addition to the closing costs the Appellants put 20% down on the purchase money mortgage.

Five days after the closing the mortgage together with the mortgage note was assigned, without the knowledge of the Appellants, to Irving Savings and Loan

which subsequently was taken over by the Resolution Trust Corporation.

In October of 1988 US Capital Corporation, the Lender, defaulted on the lease and the Appellants notified them that the mortgage payments would be withheld until the lease was up to date. In February of 1989 the mortgage servicer, Mellon Financial Services, sent the Appellants notice that acceleration and foreclosure would occur if the mortgage was not up to date. Mellon abided by the agreement in the mortgage and in this same notice they advised the Appellants of the Appellants right to assert any defense to acceleration and foreclosure. In March of 1989 the Appellants filed suit against US Capital, its affiliates and Mellon Financial Services because of the breach of the leaseback.

It later became apparent that a fraud was perpetrated by US Capital Corporation,

on the Appellants, concerning the allowed use of the property. Although when the Appellants first saw the Enclave it was an operating hotel, it was, unbeknownst to the Appellants, operating illegally. US Capital had failed to apply for the proper land use compliance certificate in their construction plan that was submitted to Atlantic City and therefore Atlantic City denied the Enclave a Mercantile license and forced the hotel operation to close down. This change in status allowed the units to be rented for periods of three months minimum rather than overnight and short term as in the hotel program. Visitors to Atlantic City desire short term rentals and that is why the Appellants purchased units that supposedly could be in the operating hotel program.

On March 1, 1990 Irving Saving and Loan, who until this time was unknown to the Appellants, filed foreclosure suits

on the units. On July 13, 1990 the Appellants filed their answer. The mortgage itself and the previous notice from Mellon Financial Services confirmed that the Appellants could assert any defense to acceleration and foreclosure. The defenses the Appellants wished to assert were; fraud in the inducement, construction defects and breach of contract.

On November 13, 1990 US Capital Corporation filed for bankruptcy. On January 17, 1991 the RTC became receiver for Irving. A meeting was held at Irving Saving and Loan and the RTC stated that they were immune to any and all defenses, independent of what was written in the mortgage documents. On November 14, 1991 the RTC served the Appellants with a complaint on the notes and the Appellants filed an answer on February 10, 1992. The RTC filed for summary judgement which, if

they prevailed, would free the RTC from their promises per the mortgage that were verified by Mellon, to face the defenses of the Appellants. The RTC did prevail and not only did they not have to face the general defenses of the Appellants they also did not have to face those defenses that were properly reflected in the banks records per 12 USC 1823 (e).

BASIS FOR FEDERAL JURISDICITION IN COURT OF FIRST INSTANCE

The Resolution Trust Corporation is an instrumentality of the United States established by 12 U.S.C. 1441a(b)(1)(A).

Under 12 U.S.C. 1441a (1) (1), any civil action to which the Resolution Trust Corporation is a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction over such

action.

By virtue of 28 U.S.C. 1331, the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

ARGUMENT

It is an undisputable fact that the Enclave was an operating hotel prior to and for a period of time after the Appellants first visited and subsequently purchased two units. It is also an undisputable fact that the hotel operation was illegal. The Public Offering Statement, the brochure, the daily room rate schedule, the master deed and the live operating luxury hotel all served to mislead the Appellants into believing that the hotel was legal.

The hotel units were sold to the

Appellants by U.S. Capital who was the builder and also the lender. The Fannie Mae/Freddie Mac Mortgage forms that were supplied by the lender held that the lender or his successors and assigns had to notify the Appellants that they had the right to assert any defense to acceleration and foreclosure per paragraph (11) and (19) of the mortgage, shown below.

(11) **Successors and Assigns Bound: Joint and Several Liability; Co-signers.** The covenants and agreements of this Security Instrument shall bind and benefit the successors and assigns of Lender and Borrower,...

(19) **Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration.....The notice shall further inform**

Borrower of the .....right to assert in the foreclosure proceeding.....any other defense of Borrower to acceleration and foreclosure."

Also, in the mortgage form in the allotted space for the description of the property there was insufficient room for a detailed description, therein a reference is made to look to the Master Deed for a full description of the property, therefore incorporating the Master Deed into the mortgage. This Master Deed accompanied the mortgage when it was sold to Irving Saving and Loan and it is also recorded with the Atlantic County Clerk. The Master Deed States in the LEASING OF UNITS section that,

"There shall be no restrictions on the right of a unit owner to lease or rent his unit"

This clearly shows the intent of the Builder/Lender to re-enforce to the Appellants that the hotel was legal.

Paragraph (11) and (19) have contract terms that bind both the bank and the RTC. 12 USC 1823(e) states that the RTC will honor such properly recorded contract terms that bind the bank. In this situation the RTC is bound to these terms independent of whether or not the bank is because they are a successor and assign and per the mortgage they are bound.

Similarly the RTC is also bound per paragraph (11) and 12 USC 1823 (e) to the agreement of the Lender in the Lender produced Master Deed for the Appellants to have unrestricted rental rights.

These are the written contract terms and Article 1, section 10 of the Constitution and the Fifth Amendment speak clearly as to why these terms

must be kept by the RTC.

12 USC 1823(e) also speaks clearly to why these terms are valid and therefore legally binding on the RTC.

The D'Denche, Duhme, v. FDIC case and the Langley v. FDIC case both clearly state that an agreement properly reflected in the banks records is enforceable against the RTC and the agreements of this case are on the face of the mortgage, therefore they are enforceable against the RTC.

The Howell v. Continental Credit Corp. case contains a bilateral agreement that tends to diminish the rights of the RTC per terms on the face of the obligation, therefore as in the Howell case the agreements of the case at bar that are on the face of the mortgage which tend to diminish the rights of the RTC should also be enforceable.

From the above it seems clear why the

Constitution, the Fifth Amendment, statute 12 USC 1823(e) and common law doctrine mandate that the terms of the mortgage have to be followed by the RTC.

Congress made no provisions to protect the RTC from the bad business decisions of failed banks. They only made provisions to protect the depositors by creating the insurance fund.

In this case for the RTC to collect from a consumer for the mistake of the bank and the bank examiners is unconscionable.

In addition to the law, common sense would seem to dictate that the RTC is bound to the mortgage terms, some of the thinking being;

- The bank and bank examiners were aware of their promise to allow the consumer to assert any defense to acceleration and foreclosure.
- The bank and bank examiners were

aware that the mortgage servicer confirmed that the consumers had the right to assert their defenses.

- The bank and bank examiners were aware of the Consumers right to unrestricted rentals.
- The Bank and the bank examiners were not required to buy the mortgage from the builder. It was a mature business decision, prudently made.
- The purchase was made at a deep discount, indicating their awareness of the risk.
- The bank and bank examiners were defrauded by the builder, as were the consumers.
- The consumers protected themselves with the terms of the mortgage but the bank and examiner did not.
- The bank paid the builder who defrauded them, they did not pay

the consumers.

- The consumers have first claim to recoup their damages.
- The RTC must make claim against the builder who defrauded them, they have no claim, legal or moral against the innocent consumer.

Two independent defenses were presented to the courts, either of them allowing the Petitioners to prevail.

1) "The right to assert any defense" as stated in the Fannie Mae mortgage as a non uniform condition of the mortgage.

2) The agreement, providing for the units to be operated as hotel properties, which is properly reflected in the bank's records.

The courts by disallowing both defenses raised further questions, which they did not address:

1) If "the right to assert any

defense" means something else, what was the document that was signed? (In the Fraud in the Factum sense.)

2) Since the hotel units were not hotel units (an undisputed fact) how could the defense of fraud in the inducement be avoided by the RTC when they are bound by the agreements made by the builder/lender especially those contained in the mortgage documents.

The courts did not address these issues and their remedies, nor did they discuss the source, limitations, or application of the undefined power the RTC brought to bear on this litigation. Further, the courts failed to comment on their authority to enforce this unwritten power.

The fact that three Federal Groups (the RTC, the District Court of New Jersey

and the 3rd Circuit Court of Appeals) would unanimously feel that the Petitioners two independent defenses are without merit would appear to be an extremely improbable event, if in fact the Petitioners were correct.

The Petitioners feel strongly that the written law clearly and consistently supports their case and that the unanimity of their opposition is not the result of an improbable event, but is the result of an endemic problem in the system, such as an unwritten law i.e. "the RTC prevails".

If this was the case, a ruling in favor of the Petitioners would not only relieve them from the financial devastation and emotional despair brought on them by the perpetrators of the fraud and the U.S. Government, but probably save thousands of other citizens from a similar plight and send a signal to the courts that America is a law abiding country.

CONCLUSION

The Resolution Trust Corporation came into possession of the Petitioners mortgages which have terms that bind all subsequent holders to the covenants and agreements, of these mortgages, made by the original Lender. Each mortgage has on its face two independent agreements each which would allow the Petitioners to prevail. The Constitution, United States Law and Common Law Doctrine all require that the RTC abide by these agreements therefore, Peter R. Mick and Donald C. Beck respectfully request that a writ of certiorari issue to the United States 3rd Circuit Court of Appeals, so that its judgement and opinion may be reviewed and reversed.

Respectfully submitted,

P. Mick D. Beck

Peter Mick and Donald Beck

PRO SE

APPENDIX A

OPINION OF THE THIRD CIRCUIT COURT OF APPEALS

ISSUED APRIL 20, 1993

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 92-5556

RESOLUTION TRUST CORPORATION, CONSERVATOR FOR IRVING FEDERAL SAVINGS AND LOAN ASSOCIATION,

Appellee

v.

DONALD C. BECK;

PETER R. MICK,

Appellants-Defendants/

Third-Party Plaintiffs

v.

RESORT DEVELOPMENT CORPORATION;

U.S. CAPITOL CORPORATION;

U.S. CAPITOL MORTGAGE CORPORATION;

RESORT HOSPITALITY CORPORATION;

PATRICK L. TOMLIN;

RICHARD W. PAYTON;

WILLIAM HRISKO;

HELEN WISZNAT;

COMMONWEALTH LAND TITLE;

PERSKIE & NEHMAD,

Third-Party Defendants

(Newark New Jersey District Civil No. 91-05195)

RESOLUTION TRUST CORPORATION, CONSERVATOR FOR IRVING FEDERAL SAVINGS AND LOAN ASSOCIATION

v.

DONALD C. BECK;

U.S. CAPITAL MORTGAGE CORPORATION;

THE ENCLAVE CONDOMINIUM ASSOCIATION;

CAESAR BOARDWALK REGENCY;

MARINA ASSOCIATED, d/b/a HARRAH'S MARINA HOTEL AND CASINO;

ELSINORE SHORE ASSOCIATES, d/b/a ATLANTIS CASINO HOTEL;

PETER R. MICK,

Defendants/Third-Party Plaintiffs

v.

RESORT DEVELOPMENT CORPORATION;

RESORT HOSPITALITY CORPORATION;

U.S. CAPITAL CORPORATION;

WILLIAM HRISKO;

PATRICK L. TOMLIN

RICHARD W. PAYTON;

HELEN WISZNAT;

MELLON FINANCIAL SERVICES;

PERSKIE & NEHMAD, Counselors at Law,

Third-Party Defendants

(Newark New Jersey District Civil No. 92-00002)

RESOLUTION TRUST CORPORATION, CONSERVATOR FOR IRVING FEDERAL SAVINGS AND LOAN ASSOCIATION

v.

PETER R. MICK;

U.S. CAPITAL MORTGAGE CORPORATION;

THE ENCLAVE CONDOMINIUM ASSOCIATION;

CAESAR BOARDWALK REGENCY;

MARINA ASSOCIATED, d/b/a HARRAH'S MARINA HOTEL AND CASINO;

ELSINORE SHORE ASSOCIATES, d/b/a ATLANTIS CASINO HOTEL,

Defendants/Third-Party Plaintiffs

v.

RESORT DEVELOPMENT CORPORATION;

RESORT HOSPITALITY CORPORATION;

U.S. CAPITAL CORPORATION;

WILLIAM HRISKO;

PATRICK L. TOMLIN;

RICHARD W. PAYTON;

HELEN WISZNAT;

MELLON FINANCIAL SERVICES;

PERSKIE & NEHMAD, Counselor at Law,

Third-Party Defendants

(Newark New Jersey District Civil No. 92-

00003)

Appeal from the United States District Court for the District of New Jersey

District Judge:
Honorable Nicholas H. Politan

Submitted Under Third Circuit Rule 12(6)
April 7, 1993

Before: MANSMANN, ALITO and ALDISERT, Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by appellants, and considering Langley v. Federal Deposit Ins. Corp., 484 U.S. 86 (1987); D'Oench, Duhme & Co., Inc.

v. Federal Deposit Ins. Corp., 315 U.S. 447 (1942), and Adams v. Madison Realty & Dev. Inc., 937 F.2d 845 (3d Cir. 1991), it is ADJUDGED AND ORDERED that the judgement of the district court be and is hereby affirmed.

Costs taxed against the appellants.

BY THE COURT,

_____

Circuit Judge

Attest:

Acting Chief Deputy Clerk

DATED: April 20, 1993

APPENDIX B

OPINION OF THE UNITED STATES DISTRICT

COURT OF NEW JERSEY

ISSUED SEPTEMBER 1, 1992

NOT FOR PUBLICATION

September 1, 1992

LETTER OPINION AND ORDER

ORIGINAL ON FILE WITH CLERK OF THE COURT

Richard L. Zucker, Esq.
LASSER, HOCHMAN, MARCUS,
GURYAN AND KUSKIN
75 Eisenhower Parkway
Roseland, NJ 07068
Attorneys for Plaintiff

Frederick C. Biehl, III, Esq.
SORIANO, HENKEL, BIEHL,
MATTHEWS AND MARINELLOW, P.C.
314 Broad Street
Bloomfield, NJ 07003
Attorneys for Defendants
Peter R. Mick and Donald C. Beck

Raymond D. Bogan, Esq.
HRYMACK & BOGAN
501 American Legion Way
Point Pleasant Beach, NJ 08742
Attorneys for Consolidated-Plaintiff
Steven Melendez

Donald Brian Mark, Esq.
SLATER, TENAGLIA & HELMER, P.A.
26 West Main Street
Marlton, NJ 08053
Attorneys for Consolidated-Defendant
Marina Associated

Re: Resolution Trust Corporation,
Conservator for Irving Federal
Savings & Loan Association v.
Peter R. Mick, et al Civil
Action No. 91-5195
(consolidated)

Dear Counsel:

This matter comes before the court on plaintiff's and defendants' cross motions for summary judgement. The motions are decided without oral argument pursuant to Rule 78 of the Federal Rules of Civil Procedure. For the reasons outlined herein, plaintiff's motion is **GRANTED**, and defendant's motion is **DENIED.**

I. BACKGROUND

On June 25, 1986, defendants Peter Mick and Donald Beck executed two notes to the order of U.S. Capital Mortgage Corporation ("U.S. Capital"), each in the amount of $283,200. Monthly payments of principal and interest in the amount of $2,590.55 each were to be paid on the first day of each and every month commencing August 1, 1986, with a final balloon payment to be paid on July 1, 1996. (See Defense Exhibit A). To secure payment of the notes,

defendants executed and delivered to U.S. Capital, two mortgages of even date with the notes, and thereby conveyed in fee the premises described as Condominium Units 2001 and 1901 in the Enclave, a condominium located at the Boardwalk and Elberon Avenue, Atlantic City, New Jersey. The mortgages were executed on the condition that such conveyances would be void if payment was made according to the term of the note. The mortgages were recorded on July 24, 1986 in the Office of the Clerk of Atlantic City.

On or about July 3, 1986, U.S. Capital executed an assignment of the mortgages in favor of Irving Savings and Loan Association ("Irving"), which assignment was recorded on August 8, 1986, in the Office of the Clerk of Atlantic County. Contemporaneously with the execution of the assignment of the mortgages, U.S. Capital endorsed the notes to the order of

Irving as evidenced by page 2 of the note. (see attachment to Defendants' Brief in Support of Summary Judgement.)

Defendants made the monthly payments of principal and interest from August 1, 1986 through September 1, 1988. Commencing October 1, 1988, However, defendants ceased making any monthly payments under the notes and mortgages.

On February 8, 1990, Irving commenced a foreclosure suit in the Superior Court of New Jersey, Chancery Division, Atlantic County, Docket #F-1774-90.[1]

On January 17, 1991, the Office of Thrift Supervision (OTS) appointed plaintiff Resolution Trust Corporation ("RTC") as receiver of Irving. The receiver took possession of Irving and succeeded to all of the rights, titles,

[1] The foreclosure actions were removed to this court on January 2, 1992, under Civil Action Numbers 92-2 and 92-3

powers and privileges of Irving. On that same day a new federal savings bank, Irving Federal was chartered by the OTS to accept the assets and assume the liabilities of Irving. RTC was appointed as conservator for the new bank. Also on that same day, RTC as receiver for Irving, entered into a purchase and assumption agreement (P & A) with Irving Federal. Under that agreement, Irving Federal acquired assets from Irving. Among the assets acquired were the notes and mortgages which are the subject of the three litigations before this court.

On November 21, 1991, RTC, as conservator for Irving Federal, commenced an action in this court (91-5195) on the two notes. As of June 1, 1992, the total amount due on the notes was $834,334.17. The foreclosure actions were removed to this court on January 2, 1992, under Civil Action Numbers 92-2 and 92-3.

Defendants deny liability on the notes by reason of Irving's alleged involvement with U.S. Capital and others in fraudulent conduct relating to the defendants' purchase of the two condominium units. Specifically, defendants allege that those parties made certain representations about the Enclave which they considered material to their purchasing the units, i.e., that plaintiff expressly and impliedly warranted to defendants that the Enclave units purchased by defendants were legally capable of occupancy as hotel units. However, the defendants have failed to demonstrate, and this court's examination of the record has failed to uncover, that these alleged representations/warranties were contained in the notes or mortgages executed by defendants in their negotiations with plaintiff.

The RTC asserts that the claims of Beck and Mick of fraud in the inducement

as alleged in their separate defense and counterclaims fall within the purview of 12 U.S.C. 1823(e) and the D'Oench, Duhme doctrine, and thus cannot be successfully asserted against the RTC.

Nevertheless, the defendants argue that because the loan documents meet the four part exception to the test under 12 U.S.C. 1823 (e), and the loan documents themselves state that the defendants are entitled to "assert their claims or defenses against the holder," then the RTC is not entitled to summary judgement. Defendants alternatively argue that the loan documents that they executed were qualified and conditional obligations and, as such, lie outside the scope of the D'Oench, Duhme doctrine. Lastly, defendants argue that summary judgement is premature because they have not had a sufficient amount of time to conduct discovery.

Accordingly, the resolution of these motions requires an examination of the scope and underlying policies of 12 USC 1823(e) and the interaction of that statute with the D'Oench, Duhme doctrine.

II DISCUSSION

A. STANDARD OF REVIEW

Summary Judgement is appropriate when "the pleading, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law. "Fed.R.Civ.P.56 (c).

The plain language of R.56 (c) mandates the entry of summary judgement, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that

party's case, and on which that party will bear the burden of proof at trial. In such a situation there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is entitled to a judgment as a matter of law because the nonmoving party has failed to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof.

Celotex v. Catrett, 477 U.S. 317,323-24 (1986).

The moving party bears the initial responsibility of stating the basis for its motion and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. Id. at 323.

He can discharge that burden by

"showing..... that there is an absence of evidence to support the non-moving parties case." Id. 323,325.

Issues of fact are "genuine only if a reasonable jury, considering the evidence presented, could find for the non-moving party." Childers v. Liberty Lobby, Inc. 842 F.2d 689,694 (3rd Cir. 1988), citing Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 249. Material facts are those which will affect the outcome of the trial under governing law. Anderson, 477 U.S. at 248. In determining when an issue of material fact exists, the court must consider all evidence in the light most favorable to the non-moving party. White v. Westinghouse Electric Company, 862 F.2d 56,59 (3rd Cir. 1988).

B. DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT

The RTC contends that the common law

doctrine established in D'Oench, Duhme & Co. v. FDIC, 315 U.S.447 (1942), and provisions of 12 USC 1823 (e) preclude the defendants (obligers) on the two notes from asserting a claim or defense against the RTC that is based upon an undisclosed agreement or condition not reflected in the loan records of a depository's files.

"[F]ederal Common law has long prevented borrowers from raising 'secret agreements' in defense to actions to enforce ostensibly unconditional obligations they owe to a bank" that a governmental body has been compelled to step in and take over. Adams v. Madison Realty & Development, Inc., 937 F.2d 845,851 (3d Cir. 1991). In Adams, the Third Circuit, explaining D'oench, Duhme, stated that the rule emerging from the seminal case is that, "no agreement between a borrower and a bank which does not plainly appear on the face of an

obligation or in the bank's official records is enforceable against the FDIC." ID. at 852. The Court of Appeals further found that this doctrine was applicable to the RTC.

Both D'oench and 1823 (a) have been applied to effectuate the public policy interest in not enforcing "secret agreements" against the RTC when it is carrying out its statutorily mandated duties to protect depositors. If the RTC is unable to rely on the accuracy of the records of a failed bank, they will not be able to carry out their duties efficiently. Thus, by requiring all "agreements" to be written, Congress ensured that a bank's records would be complete when an insolvent bank is taken over by the RTC, so that "mature consideration" may be made of loan transactions. Adams, 937 F.2d at 958. Therefore, even if the bank examiners have

actual knowledge of a defense to a loan or claims based therein, unless the agreement on which the defense or claims is based meets the requirement of section 1823 (e), it cannot be asserted against the RTC. Id.

In Langley v. Federal Deposit INS. Corp., 484 U.S. 86, 92 (1987), Justice Scalia, writing for the majority, defined "agreement" as used in section 1823 (e) to include all of the conditions on performance which were a part of the original bargain. To support this definition of an agreement, Justice Scalia cited to Farnsworth who said that "promises, which impose duties, and conditions, which make duties conditional, are the main components of agreements." Id. at 94. The Langley court held that fraudulent misrepresentations alleged to have induced the execution of a promissory note constituted an "agreement" that could

not diminish the FDIC's interest in acquired assets unless the agreement satisfied each requirement under section 1823 (e). Id. at 86. Since the plaintiff's agreement in that case was not reflected in the records of the bank in accordance with 1823 (e), the plaintiffs could not assert their claim of fraud in the inducement against the FDIC.

In Adams the Third Circuit noted that the Langley court's interpretation of the word "agreement" in 1823 (e) "was consistent with D'Oench, Duhme," because

> one who signs a facially unqualified note subject to an unwritten and unrecorded condition upon its repayment has lent himself to a scheme or arrangement that is likely to mislead the baking authorities, whether the condition consists of performance of a counterpromise or of the truthfulness of a warranted fact.

Adams, 937 F.2d at 854-854. Accordingly, courts have continuously rejected attempts by obligers who seek to prevent enforcement of their obligations by asserting separate, secret, unrecorded agreements. See generally, D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942); Langley v. FDIC 484 U.S. 86 (1987);Adams v. Madison Realty & Development, Inc.937 F.2d 845 (3d Cir. 1991); Federal Savings & Loan Corp. v. Murray, 853 F.2d 1251 (5th Cir. 1988).

Defendant's primary argument is that because the loan documents themselves state that the defendants are entitled to "assert their claims with defenses against the holder," then the loan documents meet the four criteria under 1823 (e). In opposition, plaintiff argues that this contention is "an illogical form of circular tautology that misses the essential point of the D'oench, Duhme

doctrine and simply proves too much." I agree.

As a general rule, the D'oench, Duhme doctrine stands for the proposition that once the RTC has taken control of the assets of a bank, then the basis of any claims or defenses that a party has against the RTC must meet the four criteria of the doctrine as codified in 12 U.S.C. 1823 (e). That section provides in full, as follows:

> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the corporation unless such agreement-

(1) is in writing,

(2) was executed by the depository institution and any person claiming a adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(3) was approved by the Board of Directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said Board or Committee, and

(4) has been, continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C. 1823 (e) (emphasis supplied).

After thoroughly examining all of the

loan documents, I find that the defendants have failed to satisfy the requirements of 1823 (e). Defendants contend that they have satisfied the writing requirement under section 1823 (e) by drawing the court's attention to the boilerplate language of the mortgages which states that they are allowed to assert claims or defenses in a foreclosure proceeding. If I applied the statute as defendants suggest, then I would eviscerate the rule itself and turn the D'oench, Duhme doctrine on its head.

In this case, there is absolutely no evidence that the alleged representations are included in the loan documents, In fact, the certifications executed by defendants allege that they were somehow defrauded by **oral representations** by the developer of the property and its subsidiary, U.S. Capital Mortgage Corporation. To this end, the Court of

Appeal in Adams appropriately stated:

> the omission from the written loan agreement of any material term of the loan that would tend to diminish the original loan is inimical to the prophylactic purpose of D'Oench, Duhme and the general Congressional purpose of full and continuous disclosure evidenced in 1823 (e).

Id. at 427.

Moreover, defendants missed the mark on Langley's construction of the work "agreement" in 1823 (e). An "agreement" includes any warranty on which the performance of a party is conditioned. In their certifications, the defendants claim that the people who sold them the condominium units made a variety of representations about the Enclave which they considered material to their purchase of the units. For example, defendants

alleged that the developers of the property and US Mortgage Corporation expressly and impliedly warranted to defendants that the Enclave units purchased by defendants were legally capable of occupancy as hotel units. Defendants also detail several other specific representations and warranties which plaintiffs have allegedly breached.

Just as in Adams, "these representations and warranties are promises, the truth of which are conditions precedent to the defendants' obligations to repay the notes." Adams, 937 F.2d at 857. Under the Langley decision, they are "agreements" that fall within 1823 (e). Since the basis of defendants Beck and Mick's defenses are oral representations, they inherently fail to meet the criteria of 1823 (e). Defendants should have insured that the alleged representations were incorporated

into the loan documents if they intended to rely upon them. Indeed, these are the precise types of "secret agreements" that the D'Oench, Duhme doctrine was designed to prevent from being asserted against the RTC.

Thus, plaintiff correctively notes that, under the Third Circuit's decision in Adams, defendants' claims of fraud in the inducement fall within the purview of the D'Oench, Duhme doctrine and 1823(e) and, therefore, cannot be asserted against the RTC.

In the alternative, defendants argue that the provisions of the D'Oench, Duhme doctrine do not apply to the loan documents at issue here because "a borrower may assert defenses where the notes are conditional." Def. Br.at 7.

In support of their argument, defendants claim that paragraphs 11 and 19

of the mortgages, read separately or in conjunction with one another, render the notes "conditional." Defendants further claim that the language contained in paragraph 10 of the notes is conditional as that term is defined under New Jersey law.

Paragraph 11 provides in part: "the covenants and agreements of this Security Instrument shall bind and benefit the successors and assigns of Lender and Borrower..." Def.Ex.B. The defendants' argument that this language renders the notes conditional is without merit. The mere fact that paragraph 11 binds and benefits successors and assigns in no way renders the mortgages conditional under New Jersey Law. See, N.J.S.A. 12A:3-104 (stating that whether a note is conditional or unconditional is only relevant if it affects defendants' obligation to pay the amount due under the

notes.)

Paragraph 19 provides in part:

> the notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the nonexistence of a default or any other defense of Borrower to acceleration and foreclosure.

Def.Ex.B.

Paragraph 10 of the notes provides in part as follows:

> That security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this note. Some of those conditions are described as follows:
>
> ...Lender may, at its option, require immediate payment in full of all sums secured by this Security

> Instrument... If Lender exercises this option, Lender shall give Borrower notice of acceleration...

Def.Ex.A.

I have carefully reviewed the language contained in paragraphs 10,11,and 19 set forth above. I find that nowhere is there a reference, either directly or indirectly, to a promise or condition of repayment which is based upon defendants ability to utilize the condominium units as a hotel.

Based on these boilerplate clauses, defendants ask the court to permit them to assert a defense of fraud in the inducement which is based on an oral agreement. This leap in logic ignores the basic requirements under 1823 (e) and the D'Oench, Duhme doctrine, namely that any agreement which tends to diminish the RTC's interest or which renders the notes

conditional, must be in writing. Defendants's circular reasoning fails to address an essential element under 1823 (e), that element being the written agreement.

Accordingly, if I were to allow defendants to ultimately raise this oral agreement through the smokescreen of the boilerplate language in paragraph 19 of the mortgages, then I would have to ignore both the letter and spirit of the law under 12 USC 1823 (e) and the D'Oench, Duhme doctrine.

In the final analysis, defendants can not escape the fact that there is no language whatsoever in paragraphs 10, 11, or 19 which states that defendants' obligation to repay the notes is conditioned on an agreement that the condominium units were capable of occupancy as hotel units.

Defendant's final argument is that

summary judgment is premature because they have not had a sufficient amount of time to conduct discovery. In support of this argument, defendants claim that as a matter of law they are entitled to and must review the banks official records to properly reply to the plaintiff's motion for summary judgement.

The court agrees with plaintiff that further discovery would not enable the defendants to avoid summary judgement. In their certifications, defendants claim that they were somehow defrauded by **oral representations** by the developer of the property and its subsidiary US Capital Mortgage Corporation. However, as the Court previously emphasized, these alleged representations, which constitute an "agreement", are not contained in any of the loan documents. As the Third Circuit opined in Adams, "the rule emerging for D'Oench, Duhme is that no agreement which

does not plainly appear on the face of an obligation or in the bank's official records in enforceable against the [RTC]." Adams, 937 F.2d at 852. Indeed, the defendants fail to satisfy the requirements of 1823 (e) because the alleged representations are not in writing. Thus, any further discovery would not disclose any information that would prevent summary judgment in favor of plaintiff.

Moreover, defendants have had two years to conduct discovery from the time plaintiff filed the foreclosure suits on February 8,1990, until Magistrate Hedges stayed discovery on March 25,1992. Thus, I conclude that defendants had sufficient time to conduct discovery.

III. CONCLUSION

In sum, the court finds that plaintiff

has discharged its burden by showing that there is an absence of a genuine issue of material fact and that plaintiff is entitled to judgment as a matter of law. Accordingly, summary judgement is hereby granted in favor of plaintiff and against defendants with respect to plaintiff's action against Beck and Mick on the notes and on the foreclosure actions. Although numerous third party claims against various third party defendants remain open in this civil action, I see no just reason to delay the entry of a final judgment in favor of the RTC and against defendants Beck and Mick. See Fed.R.Civ.P.54(b). Accordingly, I will grant plaintiff's request to certify final judgement in this action with respect to plaintiff's claims against Beck and Mick. Counsel for plaintiff is hereby directed to submit appropriate orders of final judgment pursuant to Rule 54(b) with respect to

plaintiff's action against defendants on the notes and on the foreclosure actions. These orders should reflect the total amount of principal and interest due and owing under the notes as of the date of entry of final judgment under Fed.R.Civ.P.54 (b).

SO ORDERED:
Nicholas H. Politan
U.S.D.J.

APPENDIX C

FINAL JUDGEMENT OF THE UNITED STATES DISTRICT COURT OF NEW JERSEY DATED OCTOBER 14, 1992

LASSER, HOCKMAN, MARCUS, GURYAN AND KUSKIN
75 Eisenhower Parkway
Roseland, New Jersey 07068
(210)226-2700
Attorneys for Plaintiff

Filed October 14, 1992
Entered October 19,1992

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

RESOLUTION TRUST CORPORATION
CONSERVATOR FOR IRVING FEDERAL SAVINGS
AND LOAN ASSOCIATION

Plaintiff,

vs.

Civil Action No.
91-5195

PETER R. MICK et al.,

FINAL JUDGEMENT
FOR FORECLOSURE

Defendants

This matter being opened to the Court (Honorable Nicholas H. Politan presiding) on May 26, 1992, and the Court having

considered the submissions of the parties and the arguments of counsel and being satisfied that good cause exists for the entry of the within order,

It is on this 14th day of October, 1992

ORDERED that:

1. The plaintiff is entitled to have the sum of $426,835.79, together with lawful interest thereon to be computed as of September 21, 1992, thereafter at a per diem rate of $86.36 until date of final judgement, together with costs of this action to be taxed including a counsel fee of $4,418.35, raised and paid out of the mortgaged premises described in the Complaint:

2. The mortgaged premises be sold to raise and satisfy the several sums of moneys due the plaintiff and that an execution issue for that purpose to the United States Marshall, commanding him to

make sale according to law of the mortgaged premises and out of the moneys arising from said sale that he first pay the plaintiff's debt, with interest therein and costs as aforesaid, to the plaintiff or its attorneys, and that case more money shall be raised by said sale as shall be sufficient to answer such several payments, that the surplus be brought into Court to abide the further order of the Court, and that the Marshall make his report of the said sale as required by law:

3. The defendants, and each of them, stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to said mortgaged premises as shall be sold as aforesaid by virtue of this judgement;

4. The plaintiff and any purchaser under the foreclosure sale duly recover against defendants Donald C. Beck and

Peter R. Mick and all parties holding by, through or claiming under them, possession of the premises mentioned and described in the Complaint, with the appurtenances, and that a writ of possession issue thereon; and

5. Pursuant to Rule 54(b), there is no just reason for delay, and the entry of final judgment be, and it hereby is, expressly directed.

NICHOLAS H. POLITAN, U.S.D.C.J.

APPENDIX D

FINAL JUDGEMENT OF THE UNITED STATES DISTRICT COURT OF NEW JERSEY DATED SEPTEMBER 23 1992

LASSER, HOCKMAN, MARCUS, GURYAN AND
KUSKIN
75 Eisenhower Parkway
Roseland, New Jersey 07068
(210)226-2700
Attorneys for Plaintiff

ENTERED SEPTEMBER 28,1992
FILE SEPTMBER 23, 1992

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

RESOLUTION TRUST CORPORATION
CONSERVATOR FOR IRVING FEDERAL SAVINGS
AND LOAN ASSOCIATION

Plaintiff,

vs.

Civil Action No.
91-5195

DONALD C. BECK et al.,

FINAL JUDGEMENT
FOR FORECLOSURE

Defendants

This matter being opened to the Court (Honorable Nicholas H. Politan presiding) on May 26, 1992, and the Court having considered the submissions of the parties and the arguments of counsel and being satisfied that good cause exists for the entry of the within order,

It is on this 23rd day of September, 1992

ORDERED that:

1. The plaintiff is entitled to have the sum of $426,839.66, together with lawful interest thereon to be computed as of September 21, 1992, thereafter at a per diem rate of $86.34 until date of final judgement, together with costs of this action to be taxed including a counsel fee of $4,418.40, raised and paid out of the mortgaged premises described in the Complaint:

2. The mortgaged premises be sold to raise and satisfy the several sums of

moneys due the plaintiff and that an execution issue for that purpose to the United States Marshall, commanding him to make sale according to law of the mortgaged premises and out of the moneys arising from said sale that he first pay the plaintiff's debt, with interest therein and costs as aforesaid, to the plaintiff or its attorneys, and that case more money shall be raised by said sale as shall be sufficient to answer such several payments, that the surplus be brought into Court to abide the further order of the Court, and that the Marshall make his report of the said sale as required by law:

3. The defendants, and each of them, stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to said mortgaged premises as shall be sold as aforesaid by virtue of this judgement;

4. The plaintiff and any purchaser under the foreclosure sale duly recover against defendants Donald C. Beck and Peter R. Mick and all parties holding by, through or claiming under them, possession of the premises mentioned and described in the Complaint, with the appurtenances, and that a writ of possession issue thereon; and

5. Pursuant to Rule 54(b), there is no just reason for delay, and the entry of final judgment be, and it hereby is, expressly directed.

NICHOLAS H. POLITAN, U.S.D.C.J.

APPENDIX E

FINAL JUDGEMENT OF THE UNITED STATES DISTRICT COURT OF NEW JERSEY

DATED OCTOBER 21, 1992

LASSER, HOCKMAN, MARCUS, GURYAN AND KUSKIN
75 Eisenhower Parkway
Roseland, New Jersey 07068
(210)226-2700
Attorneys for Plaintiff

Filed October 21, 1992
Extended October 22,1992

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

RESOLUTION TRUST CORPORATION
CONSERVATOR FOR IRVING FEDERAL SAVINGS AND LOAN ASSOCIATION

Plaintiff,

vs.

Civil Action No. 91-5195(NHP)

DONALD C. BECK et al.,

FINAL JUDGEMENT FOR FORECLOSURE

Defendants.

This matter being opened to the Court (Honorable Nicholas H. Politan presiding)

on May 26, 1992, and the Court having considered the submissions of the parties and the arguments of counsel and being satisfied that good cause exists for the entry of the within order,

It is on this 21st day of October, 1992.

ORDERED that:

1. Final judgement be, and it hereby is, entered in favor of plaintiff Resolution Trust Corporation, receiver of Irving Federal Savings and Loan Association, and against defendants Donald C. Beck and Peter R. Mick in the amount of $853,675.45, plus attorney fees in the amount of $7,305.00 and disbursements in the amount of $264.18, for a total judgment of $861,244.63 and

2. Pursuant to Rule 54(b), there is no just reason for delay, and the entry of final judgment be, and hereby is, expressly directed. (NHP, U.S.D.C.J.)

Supreme Court, U

(2)

AUG 20 1993

OFFICE OF THE CLERK

No. 93-124

In the Supreme Court of the United States

OCTOBER TERM, 1993

PETER R. MICK AND DONALD C. BECK, PETITIONERS

v.

RESOLUTION TRUST CORPORATION, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

RICHARD T. ABOUSSIE
Acting General Counsel

JAMES M. BAKER
Assistant General Counsel

MICHAEL P. CONDON
JEFFREY I. EHRLICH
Counsel
Resolution Trust Corporation
Washington, D. C. 20403

BEST AVAILABLE COPY

9 pp

QUESTION PRESENTED

Whether this Court's decision in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), and 12 U.S.C. 1823(e) (Supp. IV 1992) bar petitioners' claims that they are not liable on promissory notes held by the Resolution Trust Corporation as conservator for a failed financial institution.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	3
Conclusion	6

TABLE OF AUTHORITIES

Cases:

D'Oench, Duhme & Co. v. *FDIC*, 315 U.S. 447 (1942)	3, 4
Howell v. *Continental Credit Corp.*, 655 F.2d 742 (7th Cir. 1981)	5
Langley v. *FDIC*, 484 U.S. 86 (1987)	3, 4

Statute:

12 U.S.C. 1823(e) (Supp. IV 1992)	3, 4

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-124

PETER R. MICK AND DONALD C. BECK, PETITIONERS

v.

RESOLUTION TRUST CORPORATION, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is unreported, but the judgment is noted at 993 F.2d 878 (Table). The order of the district court (Pet. App. B1-B30) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1993. The petition for a writ of certiorari was filed on July 19, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 25, 1986, petitioners purchased two condominium units in Atlantic City, New Jersey, in return for which they executed two promissory notes payable to U.S. Capital Mortgage Corporation, each in the amount of $283,200, secured by mortgages on the condominium units. In early July, the mortgages and notes were assigned to Irving Savings and Loan Association. Although the building in which the units were located apparently was operating as a hotel at the time petitioners purchased the units, local authorities subsequently closed the operation because of its failure to comply with local laws. See Pet. App. B3-B5; Pet. 8.

Petitioners subsequently ceased making the requisite monthly payments on the notes, and Irving Savings and Loan responded by instituting foreclosure proceedings in the New Jersey state courts. Before those proceedings were completed, the Resolution Trust Corporation (RTC) was appointed receiver of Irving Savings and Loan, some of the assets of Irving Savings and Loan (including the notes in question) were transferred to a new institution, Irving Federal Savings and Loan Association, and the RTC was appointed conservator of Irving Federal. In due course, the RTC as conservator of Irving Federal removed the foreclosure actions to federal court and instituted a separate action to collect on the notes. See Pet. App. B5-B6.

2. Petitioners contended that they were not liable on the notes because they believed that Irving Savings and Loan had been involved with U.S. Capital in a scheme to defraud petitioners into purchasing the condominium units by persuading petitioners that the

units could be operated as hotel units. See Pet. App. B7. The district court rejected that argument and entered summary judgment for the RTC as conservator. *Id.* at B1-B30. The court reasoned that the claims were barred by *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), and 12 U.S.C. 1823(e) (Supp. IV 1992). Pet. App. B11-B28. As the district court explained, petitioners' primary argument was that their reliance on the oral representations was not impermissible because a provision in the loan documents stated that petitioners would be entitled to "assert their claims with defenses against the holder," Pet. App. B16. The court acknowledged that the clause on which petitioners relied satisfied the requirements of *D'Oench, Duhme* and Section 1823(e), but concluded that the relevant question was whether the representations that allegedly defrauded them satisfied those requirements. Because the representations that allegedly defrauded petitioners were completely absent from any documents in the records of the failed institution, the district court refused to allow petitioners to interject them as a bar to the RTC's suit to collect on the notes. Pet. App. B19-B22.

3. The court of appeals affirmed in a brief opinion citing *D'Oench, Duhme* and *Langley* v. *FDIC*, 484 U.S. 86 (1987). Pet. App A1-A6.

ARGUMENT

Petitioners renew their argument that the terms of the loan documents permit them to refuse payment of the notes on the basis of representations that are not reflected in any of the documents contained in the records of the failed institution. Pet. 11-20. That claim is inconsistent with both 12 U.S.C. 1823(e)

(Supp. IV 1992) and this Court's decision in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942). As this Court explained in *Langley* v. *FDIC*, 484 U.S. 86 (1987), an individual

> who signs a facially unqualified note subject to an unwritten and unrecorded condition upon its repayment has lent himself to a scheme or arrangement that is likely to mislead the banking authorities, whether the condition consists of performance of a counterpromise (as in *D'Oench, Duhme*) or of the truthfulness of a warranted fact.

Id. at 93. Petitioners' reliance on the alleged representations that the condominiums they purchased could be used as hotel units is barred by the same reasoning.

Nor can petitioners evade that reasoning by relying on terms of the loan documents that allow them to assert against assignees of the loan documents any defenses they had against the original lender. That argument rests on the premise that the RTC's rights are no greater than the rights of any ordinary commercial assignee of the loan documents. *D'Oench, Duhme* and Section 1823(e) rest on a contrary premise, that federal regulatory authorities are in fact not subject to defenses that could be asserted against the failed institution, unless those defenses are, among other things, set forth in documents in the files of the failed institution. Hence, as the district court explained in detail (Pet. App. B19-B22), the relevant question is whether the agreement on which petitioners rely—that their obligation to pay the notes is conditioned on the condominium units being usable as hotel units—appears on the face of the loan documents in the records of the failed institution.

Because it does not, petitioners cannot press that defense against the RTC as conservator for the failed institution.

Finally, petitioners' reliance (Pet. 15) on *Howell* v. *Continental Credit Corp.*, 655 F.2d 743 (7th Cir. 1981), is misplaced. In that case, a lessee argued that it was not obligated to pay rent under a lease that had been assigned to the FDIC's predecessor, based on the failure of the lessor to acquire title to the leased property. The Seventh Circuit accepted that argument, relying on clauses of the lease that required the lessor to obtain and maintain title to the leased property. Based on those clauses, the court concluded that the defense "arises directly and explicitly from the provisions of the leases which were in the bank's files and which the FDIC now seeks to enforce." *Id.* at 747. No such conclusion could be drawn from the record in this case.*

---

* Petitioners' reliance (Pet. 13) on the terms of a master deed covering the premises is misplaced. The reference in the lease to the master deed's legal description falls far short of an incorporation by reference of all the terms of the master deed. In any event, even petitioners do not go so far as to suggest that the master deed provided that the lessor had an obligation to ensure that governmental authorities did not interfere with use of the premises as a hotel unit, much less that the obligation of a purchaser of a unit to make payments on a promissory note issued to a third party would be conditioned on the legality of using the premises as a hotel unit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

RICHARD T. ABOUSSIE
Acting General Counsel

JAMES M. BAKER
Assistant General Counsel

MICHAEL P. CONDON
JEFFREY I. EHRLICH
Counsel
Resolution Trust Corporation

AUGUST 1993

NO. 93-124

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

PETER MICK AND DONALD BECK PETITIONER

VERSUS

RESOLUTION TRUST CORPORATION RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

PETER R. MICK
PRO SE
4 STONEY BROOK TRAIL
KINNELON,NJ 07405
201-838-1725

DONALD C. BECK
PRO SE
18 WOOD GLEN WAY
PARSIPPANY,NJ 07005
201-334-7524

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether this courts decision in D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942), and 12 U.S.C. 1823(e) (Supp. IV 1992) bar petitioners' claims that **[if the RTC does not abide by the agreements in the mortgage obligation as required by the D'Oenche, Duhme doctrine, 12 U.S.C. 1823(e), the Constitution and the Fifth Amendment then]** the petitioners are not liable on the mortgage obligation held by the Resolution Trust Corporation for a failed financial institution.

TABLE OF CONTENTS

Question Presented.....i

Table Of Authorities.....v

Statutes Not Previously Cited.....vi

Interested Parties.....vi

Summary Of Argument.....1

Argument.....3

The Respondents Question Focuses On The Fraud Case (Which Is Not On Trial) Neglecting The Question Presented By The Petitioners.....3

The Respondents Presentation Of The Question Presented Shows A Lack Of Understanding Of The Issue Or It Is An Attempt To Mislead The Court.....7

Errors Of Fact In The Respondents Presentation Of The Question.....9

The Respondents Argument Does Not
Address The Question The Petition-
ers Have Placed Before The Court.....10

Comment On The Validity
Of The Opening Sentence
Of Respondents Argument.....12

Respondents Quotation From Langley
v. F.D.I.C., 484 U.S. 86 (1987)
Clearly And Conclusively Makes
Petitioner's Case Prima Facie.....14

Respondent States That Terms of
The Loan Documents Allow Petitioners
To Assert Against (Successors)
Assignees of The Loan Documents
Any Defenses They Had Against
The Original Lender.....16

Respondents Are Reluctant To
Recognize The Fact That *D'Oenche, Duhme* and 12 U.S.C. 1823(e) Address
The Enforceability Of Agreements.....17

Reliance On *Howell v. Continental Credit Corp.*, 655 F.2d 743
(7th Cir. 1981) Is Not Misplaced.....19

Conclusion.....20

TABLE OF AUTHORITIES

CASES CITED

D'Oenche, Duhme & Co .v. FDIC,
315 U.S. 447 (1942).....i,1-3,13,17-19

Langley v. FDIC,
484 U.S. 86 (1987).....14,17

Howell v. Continental Credit
Corp., 655 F.2d 742
(7th Cir. 1981).....19,20

FEDERAL STATUTES CITED

12 U.S.C. 1823(e).....i,1-3,8-13,17-19

STATE STATUTES CITED

N.J.S.A. 45:22A-37(a).....vi,6

UNITED STATES CONSTITUTION CITED

Article 1, Section 10-1.....7,20

Fifth Amendment.....i,7,9,10,20

STATUTES NOT PREVIOUSLY CITED

Planned Real Estate Development Full Disclosure Act. N.J.S.A. 45:22A-37(a)

Any developer disposing of real property subject to this act, who shall violate section 6 hereof, or who in disposing of such property makes an untrue statement of material fact or omits a material fact from any application for registration, or amendment thereto, or from any public offering statement, or who makes a misleading statement with regard to such disposition, shall be liable to the purchaser for double damages suffered, and court costs expended, including reasonable attorneys fees, ...

INTERESTED PARTIES:

Patrick L. Tomin

Richard W. Payton

William W. Hrisko

Perskie & Nehmad

SUMMARY

The respondent has asked the wrong question and therefore draws the wrong conclusion. The respondent's question (Res. I) bears no relationship to the question the petitioners have placed before the court. The question presented on page (i) of this brief has boldly printed in brackets what has to be added to the respondent's question for it to apply to this case.

The respondent agrees that the loan documents guarantee the petitioner the right to assert any defenses against successors and assigns of the lender that he could assert against the lender. He also agrees that the requirements of D'Oenche, Duhme and 12 U.S.C. 1823(e) are met. In spite of this, respondent claims that the agreement is invisible to the RTC, not enforceable as the law demands.

The respondent also agrees that the

mortgage incorporates the master deed, which provides for the property to be usable as a hotel, but even though the entire deed is properly recorded he claims that the portions of the master deed detrimental to the RTC are not really incorporated into the mortgage and are therefore secret agreements.

By wrongly assuming that the agreements are secret and invisible the respondent claims to prevail.

The respondent continues to come to highly prejudiced conclusions and erroneously decides that D'Oenche, Duhme and 12 U.S.C. 1823(e) **do not pertain to agreements** but only to defenses, and that agreements are not defenses.

Respondent has not addressed the fact that **the relevant law deals with the enforceability of agreements and since the agreements on which the petitioners are relying are not invisible or secret, the petitioners must prevail.**

ARGUMENT

THE RESPONDENTS QUESTION (see Res. I) FOCUSES ON THE FRAUD CASE (WHICH IS NOT ON TRIAL) NEGLECTING THE QUESTION PRESENTED BY THE PETITIONERS.

The phrasing of the respondent's question is the reason the petitioners' question is before the court of last resort. They are combining two independent issues to replace the single issue petitioners have placed before this court.

1st issue Are three covenants in a set of Fannie Mae mortgage documents that meet all of the requirements of 12 U.S.C. 1823(e), D'Oenche, Duhme and its derivative progeny valid against the RTC? This is the petitioners' Question.

2nd issue Will the petitioners' other defenses to the fraud allow them to avoid liability on the mortgage documents in a

fair trial? If this court permits their use the petitioners' claims will consist of far more than the three robust claims in the mortgage documents themselves.

The wording of the respondent's question misleads the court into focusing on the second issue, thus avoiding the consequences of the first issue which is his liability.

The purpose of the Summary Judgement in the court below was to decide the first issue. The RTC steered the court into focusing on the second issue. As a result, the court's ruling, (i.e., that the defenses of the second issue were not admissible) never even dealt with the first issue, a legal question pertaining to the enforceability of agreements in loan documents. This same tactic is being used before this court.

The petitioners feel strongly that this is a shabby tactic for the Justice

Department to use against its own citizens. A clear example of this tactic of drawing in questions relating to the facts of the fraud is the footnote (see Res. 5) where they attempt to suggest that the strong reference in the mortgage to the master deed, which is the only document that describes the structure and its allowed use, is not strong enough to make the master deed completely part of the bank's records even though it was entered into the bank's records as part of the mortgage contemporaneously with the other loan documents. The part of the master deed (the entire document is in the bank's records) that the respondent states may not be in the bank's records refers to unrestricted rentals (see Pet. 13.). The strength of this clause in the deed is such that the respondent would rather deal with it by saying it is not in the bank's records

(making it a secret agreement) when it is in the bank's records. They find this easier than confronting the agreement itself.

The content of this footnote is filled with errors of fact:

1) The word lease should be mortgage.

2) The word lessor should be mortgagee.

3) The mortgage was not issued to a third party. It was issued to the builder (mortgagee).

4) The builder (mortgagee) was required by law N.J.S.A. 45:22A-37(a) to assure that all statements in the master deed were true. Therefore, it was his duty to assure that governmental authorities did not interfere with the use of the premises as defined by the master deed.

5) It was expected that payments to a third party successor or assign of the mortgagee would be conditioned by the agreement of the mortgagee giving the

petitioners the right to unrestricted rentals. Paragraph 11 of the mortgage (see Pet. 12.) binds the RTC to the agreements of the lender contained in the mortgage.

In the case before the court the documents and their conditioning covenants are clear, and in the bank's records, the law is clear in its letter and intent, and the RTC's liability is clear and unquestionable.

THE RESPONDENT'S PRESENTATION OF THE QUESTION PRESENTED SHOWS A LACK OF UNDERSTANDING OF THE ISSUE OR IT IS AN ATTEMPT TO MISLEAD THE COURT

The question the petitioners have placed before the court is whether Article 1, Section 10-1 of the Constitution, the Fifth Amendment, 12 U.S.C. 1823 (e) and common law doctrine bar <u>respondent</u> from claiming that he is

not obligated to honor the agreements of the mortgage obligation.

In their misleading presentation of the same question, the respondent insinuates that it is the petitioners who deny being obligated to honor the agreements in the mortgage obligation.

It has always been made clear by the petitioners that the petitioners are seeking to have the mortgage obligation honored by both parties. The petitioners are liable on the mortgage documents per all of its terms. It is the respondent who is seeking to avoid his obligation by voiding the terms favoring the petitioners.

For the Justice Department to completely evade the question presented and to not address why they will not honor their agreements when the Constitution, the Fifth Amendment, 12 U.S.C. 1823(e) and common law doctrine

demand that they do so is disturbing to the petitioners. Every were you look in the pertaining law and doctrine it states that the RTC will honor properly recorded agreements and it seems that the petitioners should be answered as to why the agreements that protect them, although properly recorded, are subject to some unknown law and therefore not enforceable.

ERRORS OF FACT IN THE RESPONDENTS PRESENTATION OF THE QUESTION

The question as presented by the respondent is highly misleading and erroneous.

1) The defendants did not sign promissory notes, they signed a mortgage obligation (i.e. security instruments, mortgage notes, and all other evidence of title.)

2) The defendants are not claiming

that they are not liable on the mortgage obligation.

3) The defendants are only claiming that they have the right to have the covenants of their contract enforced per the Constitution, the Fifth Amendment, 12 U.S.C. 1823(e) and common law doctrine.

THE RESPONDENT'S ARGUMENT DOES NOT ADDRESS THE QUESTION THE PETITIONERS HAVE PLACED BEFORE THE COURT

The respondent renews the same tactic as employed by the RTC in the courts below. His response is replete with references to what he believes are the petitioner's defenses to the fraud. Not only is his perception of these defenses wrong, were it correct, references to the defenses would only tend to cloud the issues and mislead the court.

It was the RTC that requested a Summary Judgement because it was their

belief that the covenants of the contract where not enforceable against them, but instead they argued the petitioners' fraud case. They did this and they continue to do so in this court without a proper trial where all of the facts can be presented. The fraud was not at issue in the Summary Judgement and it is not at issue in this court. The question at issue that has never been answered and is still being asked, is:

Are the agreements in the mortgage calling for the petitioners to have the right to assert defenses against the RTC and the right to use the property as a hotel, both which condition the obligation and meet all Section 1823(e) requirements, valid and legally binding against the RTC?, and if not, why not?

COMMENT ON THE VALIDITY OF THE OPENING SENTENCE OF RESPONDENTS ARGUMENT

The respondent should be admonished for the gross errors of omission in the first sentence of his argument (see Res. 3.), where he attempts to lead the court into believing that the representations are not in the records of the failed institution.

The entire thrust of the petitioners' argument is that three independent representations exist in the loan documents in the records of the failed institution that meet all of the requirements of 12 U.S.C. 1823(e).

1) THE REPRESENTATION of the petitioners' right to assert any defenses.

2) THE REPRESENTATION that successors and assigns are bound to the lenders agreements.

3) THE REPRESENTATION as to property

usage (warranted fact) in the mortgage referenced master deed.

The first missing representation the respondent himself refers to sixteen (16) lines above the beginning of his argument (see Res. 3.), where he paraphrases the Honorable Judge Politan stating " the court acknowledged that the clause on which the petitioners relied satisfied the requirements of D'Oenche, Duhme and Section 1823(e).....". Since it meets Section 1823(e) it must be in the records of the failed institution.

The second representation is discussed on the following page (see Res. 4.) bottom half, indicating that not only is it in the loan documents but it allows for the enforcement of the first representation against (successors) assignees of the original lender.

The third representation, is discussed in a footnote (see Res. 5.), where it is

indicated that incorporation of the deed by reference falls far short of incorporation by reference of the deed. Whatever that means, he is acknowledging its existence in the documentation.

RESPONDENTS QUOTATION FROM LANGLEY v. FDIC, 484 U.S. 86 (1987) (see Res. 4.) CLEARLY AND CONCLUSIVELY MAKES PETITIONERS CASE PRIMA FACIE.

The quote is stated with comments below.

Quote "an individual who signs a facially unqualified note"

Comment The loan documents are facially qualified per paragraph 11 and 19 of the mortgage (see Pet. 12, 13.) and by paragraph 13 of the master deed (see Pet. 13.) which is incorporated into the mortgage.

Quote "subject to an unwritten and unrecorded condition upon its repayment

has lent himself to a scheme or arrangement that is likely to mislead banking authorities,"

Comment The paragraphs in the mortgage and master deed cited above are written and recorded and are properly in the bank's records and therefore the banking authorities could not have been misled. The rights of the petitioners, provided by the loan documents, have always been known.

Quote "whether the condition consists of performance of a counterpromise (as in D'Oenche, Duhme) or the truthfulness of a warranted fact."

Comment Paragraph 19 of the mortgage (see Pet. 12, 13.) is a counterpromise but differing from D'Oenche, Duhme in that it is on the face of the loan documents. Paragraph 13 of the master deed which is incorporated into the

mortgage is a warranted fact the truthfulness of which the petitioners relied on.

The above demonstrates that it is not the petitioners doing the misleading. It is the bank examiners who are misleading consumers by allowing the banks to purchase loans on the secondary market when they know the terms of such loans will not be honored by the RTC if the bank fails.

RESPONDENT STATES THAT TERMS OF THE LOAN DOCUMENTS ALLOW PETITIONERS TO ASSERT AGAINST (SUCCESSORS) ASSIGNEES OF THE LOAN DOCUMENTS ANY DEFENSES THEY HAD AGAINST THE ORIGINAL LENDER. (see Res. 4.)

Respondent suggests that he does not have to abide by this because the words "successors and assigns" in paragraph 11 (see Pet. 12.) of the mortgage which

normally are defined as any subsequent holder are to be redefined to mean any subsequent holder EXCEPT THE RTC.

If this is the case, it is unfortunate that Fannie Mae, a government chartered organization founded to benefit consumers, did not add this to their documents. By such an omission, the petitioners are now victims of this oversight as well as the fraud.

RESPONDENTS ARE RELUCTANT TO RECOGNIZE THE FACT THAT D'OENCHE, DUHME and 12 U.S.C. 1823(e) ADDRESS THE ENFORCEABILITY OF AGREEMENTS

The respondent seems to feel that D'Oenche Duhme and 12 U.S.C. 1823(e) relate to the RTC's immunity to defenses where in actuality this law deals with agreements and it was the Langley decision that placed warranted facts alongside counterpromises as agreements

and if properly recorded they would be valid and legally binding against the RTC.

An example of this confusion can be seen in the following quote from the respondent's brief.

"D'Oenche, Duhme and Section 1823(e) rest on a contrary premise, that federal regulatory authorities are in fact not subject to defenses that could be asserted against the failed institution, unless those defenses are, among other things, set forth in documents in the files of the failed institution." (Res. 4.)"

If the word defenses is replaced with the word agreements the above quotation comes much closer to encompassing the intent of the Congressionally ratified 12 U.S.C. 1823(e) and the actual D'Oenche,

Duhme doctrine which speak only to the enforceability of agreements. These agreements include counterpromises and warranted facts. This being the case the respondent now is akin to a normal assignee when the agreements are properly in the bank's records unless he has some unwritten power as he suggests and therefore is immune to all damaging agreements.

RELIANCE ON HOWELL v. CONTINENTAL CREDIT CORP., 655 F.2d 743 (7th Cir. 1981) IS NOT MISPLACED

Petitioners are not obligated to pay the loan because of the failure of the lender to assure that the property had no restrictions on rental as provided for in the master deed part of the mortgage, and the failure of the RTC to abide by the terms in the mortgage stating they must face the petitioners' defenses.

The Howell court concluded that when the defense "arises directly and explicitly from the provisions of the leases which were in the bank's files" it is acceptable.

Similarly, the petitioners' three provisions are contained in the loan documents and therefore their defenses are acceptable.

CONCLUSION

It is clear that **a federal law cannot make unenforceable that which this same law**, along with the controlling laws, Article 1, Section 10-1 of the Constitution and the Fifth Amendment, **makes enforceable**. Therefore a writ of certiorari should be granted.

Respectfully submitted.

Peter R. Mick Donald C. Beck (PRO SE)